HONORABLE MARSHA J. PECHMAN

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Michelle Chinnick, Plaintiff, v. National Credit Systems, Inc., Defendant.	Case No.: 2:15-cv-1675 **DEFENDANT NATIONAL CREDIT SYSTEMS, INC.'S MOTION FOR SUMMARY JUDGMENT** **NOTED ON MOTION CALENDAR: FRIDAY DECEMBER 30, 2016**

Pursuant to Fed. R. Civ. P. 56, Defendant National Credit Systems, Inc. ("NCS"), through undersigned counsel, respectfully moves the Court to enter Judgment against Plaintiff and dismiss Plaintiff's complaint against NCS with prejudice. There is no genuine issue of material fact, and NCS is entitled to judgment as a matter of law. In support of its motion, NCS states the following:

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INTRODUCTION

Plaintiff Michelle Chinnick brings this suit alleging violations of the Fair Debt Collection Practices Act ("FDCPA"). Plaintiff alleges that NCS violated the Fair Debt Collection Practices Act ("FDCPA") by: "threatening to take action it did not intend to take" in violation of § 1692e(5), (Dkt 15, ¶ 10); misrepresenting the character or legal status of Plaintiff's debt in violation of § 1692e(2)(A), (Dkt. 15, ¶ 11); and "communicating or threatening to communicate credit information which is known to be false" in violation of § 1692e(8). (Dkt. 15, ¶ 12).

NCS is entitled to summary judgment because Plaintiff's § 1692e(5) claim is time-barred by the FDCPA's one-year statute of limitations. Moreover, summary judgment is appropriate on Plaintiff's other claims because Plaintiff has not, and cannot, show any genuine issue of material fact. For the reasons outlined below, NCS asks this Court to grant its motion for summary judgment.

STATEMENT OF MATERIAL FACTS

1. On or about February 14, 2011, The Timbers at Kenmore referred an unpaid apartment debt due and owing from Plaintiff in the amount of $3,622.50 to NCS for collection (the "Debt"). (Declaration of Ron Sapp ("Sapp") attached hereto as Exhibit A at ¶ 7).

2. On October 15, 2013 Plaintiff contacted NCS by telephone and indicated that she disputed the debt. (Sapp, ¶ 8).

3. In accordance with NCS policy, Plaintiff's account was notated as disputed contemporaneously with Plaintiff's October 15, 2013 phone call. (Sapp, ¶ 9).

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4. On October 21, 2013, Plaintiff's account, containing the October 15, 2013 dispute notation, was reported to the credit bureaus. (Sapp, ¶ 10).

5. At all relevant times subsequent to October 15, 2013, Plaintiff's account has contained the dispute notation placed on the account on October 15, 2013. (Sapp, ¶ 11).

LEGAL STANDARD

Summary judgment is proper where, as is the case here, the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). Facts are material if they "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Movant bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). However, once movant satisfies that burden, [Plaintiff] must identify specific facts in the record raising a genuine issue for trial in order to defeat the motion for summary judgment. *Id.* at 324. The moving party may support the motion with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).

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ARGUMENT

I. PLAINTIFF'S § 1692e(5) CLAIM IS TIME-BARRED UNDER THE FDCPA'S ONE-YEAR STATUTE OF LIMITATIONS.

A claim under the FDCPA must be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). In general, the discovery rule applies to statutes of limitations in federal litigation. That is, "[f]ederal law determines when the limitations period begins to run, and the general federal rule is that a limitations period begins to run when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Lyons v. Michael & Associates,* 824 F.3d 1169, 1171 (9th Cir. 2016)(quoting *Mangum v. Action Collection Service, Inc.*, 575 F.3d 395, 940 (9th Cir. 2009).

"Discovery" encompasses not only those facts the plaintiff actually knew, but also those facts a reasonably diligent plaintiff would have known." *Merck & Co., Inc. v.* Reynolds, 130 S.Ct. 1784, 1796 (2010). The ultimate question is whether a reasonably diligent plaintiff would have *discovered* the facts constituting the violation. *See Strategic Diversity, Inc. v. Alchemix Corp.,* 666 F.3d 1197, 1206 (9th Cir.2012).

Plaintiff alleges that NCS violated § 1692e(5) of the FDCPA by threatening to take legal action without actually filing a lawsuit. (Dkt. 15, ¶ 10). Plaintiff alleges that NCS made this threat in 2011, fully five years prior to Plaintiff filing this lawsuit. In support of her allegation, Plaintiff offers nothing more than the conclusory statement that she "only recently realized this was untrue." *(Id.).* Unfortunately for Plaintiff, "[t]he burden is on the plaintiff to show diligence, and conclusory allegations will not withstand demurrer." *E–Fab, Inc. v.*

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Accountants, Inc. Servs., 153 Cal.App.4th 1308, 1319 (2007); *Bonyadi v. Citimortgage, Inc*., 2013 U.S. Dist. LEXIS 83486, at *11–12, 2013 WL 2898143 (C.D. Cal. June 10, 2013); *see also CAMSI IV v. Hunter Tech. Corp*., 230 Cal.App.3d 1525, 153637 (1991)("Mere conclusory assertions that delay in discovery was reasonable are insufficient and will not enable the complaint to withstand general demurrer."). Thus, it is Plaintiff who must show diligence and the record evidence shows none.

The discovery rule is "not available to avoid the consequences of one's own negligence." *Lehman v. U.S.*, 154 F.3d 1010, 1016 (9th Cir. 1988). Here, Plaintiff stood idly by and did exactly nothing to investigate the status of threatened or pending legal action against her. Indeed, a reasonably diligent debtor learning of a debt in 2011 would have, at a minimum, promptly investigated the validity of the alleged debt as well as the potential consequences of failure to pay the debt, including the possibility of being sued. Even a cursory investigation as to her rights as a debtor would have led Plaintiff to the text of the very statute she brings this action under. Moreover, a reasonably diligent debtor would have attempted to avoid being sued by contacting NCS in the first instance.

Instead, Plaintiff waited over two years before even contacting NCS regarding the debt. Even when she did contact NCS in 2013, Plaintiff made no inquiry as to the possibility of NCS filing a lawsuit against her. Only now, five years after Plaintiff alleges NCS threatened to sue, Plaintiff impermissibly claims that she only figured out that NCS's alleged 2011 threat is untrue.

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Plaintiff cannot point to any record evidence indicating that she ever made any attempt to investigate NCS's alleged threat. Had Plaintiff been "reasonably diligent" she would have learned of the facts constituting the alleged violation in 2011 when she alleges that NCS initially threatened to sue. At the very worst, Plaintiff would have learned of these facts in 2013 when she actually contacted NCS. Instead, Plaintiff buried her head in the sand and claims now ignorance. It cannot be said that this is the diligence required under the law and NCS is entitled to summary judgment because the statute of limitations has run.

II. NCS IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S § 1692e(2)(A) AND §1692e(8) CLAIMS AS A MATTER OF LAW BECAUSE THE UNDISPUTED FACTS SHOW THAT THE DEBT WAS ACCURATELY REPORTED.

Plaintiff's allegations that NCS violated § 1692e(2)(A) and § 1692e(8) are equally unsupported in the record. The FDCPA prohibits communicating credit information which is known, or should be known to be false. 15 U.S.C. 1692e(8). Plaintiff's complaint alleges that NCS violated this section by failing to report Plaintiff's debt as disputed. (Dkt. 15, ¶ 12). Similarly, §1692e(2)(A) prohibits, in relevant part, the false representation of the character or status of any debt. 15 U.S.C. 1692e(2)(A). Plaintiff alleges that NCS violates this section of the FDCPA by continuing to report debt as owing after learning of Plaintiff's dispute. (Dkt. 15, ¶ 11).

Plaintiff cannot present any evidence showing that NCS reported information that it knew to be false in violation of § 1692e(8) because there is none. The undisputed facts of this case are clear. On October 15, 2013, Plaintiff's collection account was notated as disputed

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when Plaintiff contacted NCS by telephone. (Sapp, ¶ 9). NCS reported Plaintiff's account to the credit bureaus on October 21, 2013. (Sapp, ¶ 10). With respect to Plaintiff's account, NCS's October 21, 2013 report to the credit bureaus contained a dispute notation. (*Id.*). Indeed, Plaintiff's account has contained this dispute notation continuously for three years. (Sapp, ¶ 11). The simple fact is that NCS truthfully reported what it knew. NCS accurately reported Plaintiff's account as "disputed" when it reported to the credit bureaus and Plaintiff can come forth with no evidence to the contrary.

The record is similarly clear with respect to Plaintiffs § 1692e(2)(A) claim. Plaintiff alleges that NCS violated this section of the FCPA by continuing to report Plaintiff's debt as owing and failing to report the account as disputed. (Dkt. 15, ¶ 11). The record evidence again belies Plaintiff's position. Plaintiff's account has been marked as disputed since Plaintiff called NCS on October 15, 2013. (Sapp, ¶ 9, 11). Each and every subsequent report to credit bureaus with respect to Plaintiff's account has contained the dispute notation. (*Id.*). It incontrovertible in the record that NCS has reported Plaintiff's account as "disputed" since October 21, 2013. Plaintiff cannot show otherwise and NCS is entitled to summary judgment.

CONCLUSION

For all of the foregoing reasons, Defendant National Credit Systems, Inc. is entitled to summary judgment in the matter.

WHEREFORE, Defendant National Credit Systems, Inc. respectfully moves the Court to enter Judgment against Plaintiff and dismiss Plaintiff's complaint against NCS with prejudice.

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Respectfully submitted,

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Dated: December 5, 2016

CERTIFICATE OF SERVICE

I, Charity A. Olson, hereby state that on December 5, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to the attorneys of record.

/s/ Charity A. Olson
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